IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. RICHARD RAYMOND BUSHAW, Appellant.	)	DIVISION ONE No. 62653-1-I UNPUBLISHED OPINION FILED: March 15, 2010

Dwyer, A.C.J. — Intent is not a separate, distinct element of the offense of assault in the third degree. Rather, it is implicit in the action of assault. Thus, the trial court did not err by declining to instruct the jury that intent constituted a separate, distinct element of the offense of assault in the third degree that had to be proved beyond a reasonable doubt in order to convict Richard Bushaw. The jury's subsequent questions to the court during its deliberations concerned legal, not factual, matters. Bushaw was not required to be present during the trial court's discussion of these questions with counsel. Accordingly, we affirm.

I

The State charged Bushaw by an amended information with, among other things, assault in the third degree, in violation of RCW 9A.36.031(1)(g). Count I of the amended information charged that Bushaw "did intentionally assault [Seattle Police Department] Officer J. D. Smith" while Smith was performing

official duties in his capacity as a law enforcement officer. Smith's testimony at trial established that, while attempting to handcuff Bushaw, the two men became engaged in a physical struggle during which Bushaw forcefully grabbed Smith's gun belt, wrists, and hands.

At the close of trial, the trial court instructed the jury concerning the elements of the offense of assault in the third degree as follows:

> To convict the defendant of the crime of assault in the third degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about May 6, 2008, the defendant assaulted John D. Smith;
> (2) That at the time of the assault, John D. Smith was a law enforcement officer or other employee of a law enforcement agency who was performing his official duties; and
> (3) That any of these acts occurred in the State of Washington.
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

The trial court also instructed the jury as to the definition of assault. It explained to the jury that "[a]n assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive." The trial court further instructed the jury that "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result

which constitutes a crime." The trial court declined to give Bushaw's requested instruction setting forth intent as a separate, distinct element of assault in the third degree.

Further, in instructing the jury as to the evidence it was required to consider during deliberations, the trial court explained that "[t]he evidence you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it." With respect to the jury's evaluation of circumstantial evidence, the trial court instructed that "[c]ircumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience."

During its deliberations, the jury asked the following questions of the trial court in writing:

> 1. Can we share personal experiences re: people outside of this case that may add knowledge to this case.
> 2. Can "Intent" be resisting/pulling away or does it have to be grabbing/hitting/touching? "Offensive"—is offensive forceful resisting?

The trial court responded in writing as follows:

> 1. No, you must only consider the evidence presented and the instructions as to the law.
> 2. It is not possible to further define "intent" or "offensive" beyond what is already provided in your instructions. Please re-read the instructions.

Although the record indicates that the trial court responded to the jury's questions after consulting with Bushaw's counsel and the prosecuting attorney, this court session was not reported in the official record proceedings and the record is unclear as to whether Bushaw was present during this session.

The jury subsequently found Bushaw guilty.

II

First, Bushaw contends that the trial court incorrectly instructed the jury as to the legal elements of assault in the third degree by not instructing that intent was a separate, distinct element of the offense. We disagree.

We review de novo alleged errors of law in jury instructions. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Due process requires that a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, § 22; Jackson v. Virginia, 443 U.S. 307, 311, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). "Accordingly, a trial court errs by failing to accurately instruct the jury as to each element of a charged crime if an instruction relieves the State of its burden of proving every essential element of the crime beyond a reasonable doubt." State v. Williams, 136 Wn. App. 486, 493, 150 P.3d 111 (2007) (citing State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Stewart, 35 Wn. App. 552,

554–55, 667 P.2d 1139 (1983)).

Pursuant to RCW 9A.36.031(1)(g), "[a] person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree . . . [a]ssaults a law enforcement officer . . . who was performing his or her official duties at the time of the assault." The statute does not provide that intent is a separate, distinct element of the offense. On the occasions that our Supreme Court has analyzed the elements of the different degrees of assault, it has explained that intent is implicit in the action of assault and the term assault, by itself, "adequately conveys the notion of intent." State v. Davis, 119 Wn.2d 657, 663, 835 P.2d 1039 (1992) (analyzing State v. Hopper, 118 Wn.2d 151, 822 P.2d 775 (1992)). Thus, in articulating the elements of assault in the third degree it is unnecessary to identify intent as a separate, distinct element. See Davis, 119 Wn.2d at 663; see also State v. Brown, 140 Wn.2d 456, 468, 998 P.2d 321 (2000) (describing a jury instruction identical to the one herein issued as including "the essential elements" of the offense of assault in the third degree); State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000) (rejecting contention that a jury must be instructed that intent is a separate, distinct element of the offense of assault in the third degree of a law enforcement officer). Bushaw does not assign error to the definitional instruction concerning intent that was issued by the trial court. As intent is not a separate, distinct element of assault in the third degree, the trial court was not required to

identify it as such in the jury instructions. There was no error.

III

Bushaw next contends that the trial court violated his constitutional right to be present during trial proceedings by responding in writing to the jury's questions in his absence. Again, we disagree.

We review de novo an alleged error in a trial court's response to a jury inquiry. State v. Becklin, 163 Wn.2d 519, 525, 182 P.3d 944 (2008) (citing State v. Hacheney, 160 Wn.2d 503, 512, 158 P.3d 1152 (2007)). Although Bushaw does not affirmatively contend that he was absent during the trial court's discussion of the jury's questions with counsel, we assume he was not present for purposes of our analysis.

Pursuant to the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment, and article I, § 22 of the Washington Constitution, a criminal defendant has the right to be present during all critical stages of a criminal proceeding. State v. Pruitt, 145 Wn. App. 784, 798, 187 P.3d 326 (2008) (quoting State v. Rice, 110 Wn.2d 577, 616, 757 P.2d 889 (1988)). A critical stage is one where the defendant's presence has a reasonably substantial relationship to the fullness of his opportunity to defend against the charge. In re Pers. Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). Generally, in-chambers conferences

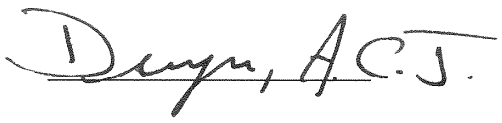
between the court and counsel on legal matters are not critical stages except when the issues raised involve disputed facts. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (citing United States v. Williams, 455 F.2d 361 (9th Cir. 1972); People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992)).

The issues raised by the jury's inquiries involved questions of law. Contrary to Bushaw's vague assertions, the jury's questions did not concern factual issues but, rather, concerned the legal definition of intent and the propriety of considering information outside of the evidence admitted at trial. Therefore, Bushaw's presence at the discussion between the trial court and counsel was not required. Further, we are not persuaded that the Washington Constitution protects a criminal defendant's right to be present during trial more broadly and more stringently than does the United States Constitution. We recently conducted a Gunwall[1] analysis of an argument similar to the one advanced by Bushaw. See State v. Martin, 151 Wn. App. 98, 107–17, 210 P.3d 345 (2009), review granted, No. 83709-1 (Feb. 9, 2010). We rejected the argument in Martin, and our analysis in that case is equally applicable to Bushaw's contentions. "Prejudice to the defendant will not simply be presumed." Lord, 123 Wn.2d at 307 (citing Rushen v. Spain, 464 U.S. 114, 117–20, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983)). Bushaw does not explain how his presence would have contributed to a different response from the trial court. Nor does he

[1] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

assign error to the responses issued by the trial court or to specific instructions to which the trial court referred the jury in its responses. Accordingly, we find no error.

Affirmed.



We concur: